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No. 755

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE ALLENDALE CO., et al.,

Petitioners,

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, et al.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT TEXTILE WORKERS UNION OF AMERICA IN OPPOSITION

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This petition for certiorari seeks review, before decision in the Court of Appeals, on the same issue which was presented for review in *Covington Mills et al.* v. *Mitchell et al.*, October Term, 1955, No. 682, *certiorari denied* March 26, 1956. All of the reasons arguing against a grant of certiorari in that case apply equally to this case. There are,

furthermore, additional reasons why certiorari should not be granted in this case.

First of these additional reasons, of course, is the fact that the petition asks direct review of the decision of the District Court, without argument or decision in the Court of Appeals. The petitioners sought this extraordinary relief because of the pendency in this Court of the *Covington Mills* case. The denial of certiorari in *Covington Mills* destroys the basis for such review and the case should be permitted to proceed in the normal manner in the Court of Appeals.

Procedure in the normal manner is not merely a formality. There are a number of substantial issues which should be resolved in the Court of Appeals before this Court should even consider a petition for certiorari.

Most important of these other issues is whether the petitioners here are proper parties to seek review of that substantive question, and, indeed, whether the District Court had any jurisdiction in the premises.

As to the question of parties, 28 companies here seek review on the merits of a District Court judgment to which 19 of them (including the Allendale Co.) are not even parties. These 19 were dismissed as plaintiffs by the District Court because they do not come within the terms of the Fulbright Amendment, on which jurisdiction rests. (Petition, p. 19). We do not deny the right of these 19 to seek review of the order dismissing them from the action. Indeed, they have done so in their appeal to the Court of Appeals in this case. But they seek review in this Court of the judgment on the merits before that appeal has been heard in the Court of Appeals. And they did not even ask this Court to review the District Court's action in dismissing them from the case.

It seems to us that it would be most inappropriate for this Court to grant the petition of these 19 plaintiffs for review on the merits and to leave for later disposition in the Court

of Appeals the question of whether they have standing to seek such review.

The District Court did permit 9 of the 28 present petitioners to remain in the case (Petition, p. 19) and it did deny the motion to dismiss the entire complaint which had been filed by the Textile Workers Union (Petition, p. 20). Unlike the other 19, therefore, these 9 are still parties to the case.

But appeals are pending in the Court of Appeals as to their status. The Secretary of Labor has noted an appeal from the refusal of the District Court to dismiss 6 of these plaintiffs on the ground that they do not come within the terms of the statute creating jurisdiction. The Textile Workers Union of America has filed an appeal in the Court of Appeals from the refusal of the District Court to hold that it had jurisdiction over none of the plaintiffs because the statute creating jurisdiction, the Fulbright Amendment, is unconstitutional. None of these appeals has yet been heard in the Court of Appeals.

In addition to these jurisdictional questions, there are other challenges to the validity of the Secretary's order which were pressed by the petitioners in the District Court and rejected by it, and which petitioners have stated they intend to press in their appeal in the Court of Appeals. These other challenges are unrelated to the "locality" question on which direct review is sought here.

We think it plain that this Court should not grant the extraordinary relief of certiorari before judgment on the bare legal question of the correctness of the District Court's ruling on the "locality" question before the Court of Appeals has had an opportunity to pass upon all of the questions which are also presented in the three appeals now pending in the Court of Appeals. We also think that, even in the absence of these considerations, the Court should deny certiorari because the decision below is plainly correct and no further review is appropriate. Our arguments in

support of that view are set forth fully in our brief in opposition in the *Covington Mills* case.

Respectfully submitted,

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Respondents.

PETITIONERS' REPLY TO MEMORANDA IN OPPOSITION

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Respondents have chosen not to answer directly the present petition for certiorari. Instead they refer the Court to their briefs in opposition in *Covington Mills, Alabama Mills, Inc., et al.* v. *James P. Mitchell, Secretary of Labor*, No. 682, certiorari denied March 26, 1956. They would have the Court treat its denial of certiorari in *Covington Mills* as requiring denial of this petition. But there are substantial reasons for granting certiorari in this case notwithstanding the denial in *Covington Mills*, which reasons have not been contravened by respondents.

1. In *Covington Mills* the Secretary of Labor established a prevailing minimum wage under the Walsh-Healey

Public Contracts Act of $1.00 per hour for the cotton textile industry. On March 1, 1956, before the petition for certiorari in that case reached this Court for disposition, $1.00 per hour became the minimum wage for all workers engaged in interstate commerce or in the production of goods for commerce, by virtue of a 1955 amendment (69 Stat. 711, 29 U.S.C. § 206) to the Fair Labor Standards Act. The Court may well have considered that, since the Secretary's determination in *Covington Mills* would have no significant future effect, the case was not sufficiently important to warrant review.

No such consideration is present in this case. The Secretary's single nationwide determination of $1.20 per hour for the woolen and worsted industry is higher than, and unaffected by, the new FLSA minimum. Members of the industry will be compelled to observe the new determination to qualify for government work. Thus the "locality" issue is a vital and pressing one in this industry and in others for which the Secretary makes nationwide determinations which exceed the FLSA minimum.*

2. In this case, unlike *Covington Mills,* the Secretary has made admissions which demonstrate that the "locality" issue should be reviewed by this Court. In his proposed determination of January 30, 1954 (19 Fed. Reg. 535) which was later adopted to be effective May 7, 1954 (19 Fed. Reg. 1930), the Secretary, after announcing that he was making a single determination "co-extensive with the entire area in which the Industry operates," observed:

> "This construction of the provisions of the Act has not been wholly free from doubt, however, and the

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* The Secretary has just issued, over industry objection, a proposed determination for the electric lamp industry on a nationwide basis and above the FLSA minimum (April 3, 1956 Department of Labor Release).

> pertinent statutory provision has been variously interpreted by parties interested in these prevailing minimum wage determinations. Congress inquired into the problem in 1952, and made provision for its solution. After considering the interpretation applied by the Department over the last 16 years and specific language proposed to require a change, Congress disposed of this question by granting to the parties adversely affected by the Secretary's determinations the right to take the question to court for ultimate judicial resolution. This right to judicial review did not exist before. Congress did not deem it advisable to exercise its power either to reverse or affirm the past practices of the Department. It left the matter to resolution of the courts through the usual processes available to aggrieved parties."

In his opposition to the petition in *Covington Mills,* the Secretary contended that the Court of Appeals was "clearly correct" in approving a nationwide determination, and that Congress had acquiesced in his disregard of the locality standard. Yet in the above passage he has conceded that his construction of the Act has not been "wholly free from doubt", that Congress did not either "reverse or affirm" past practices of the Department, and that Congress looked to "ultimate judicial resolution" of the locality question. In *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940), this Court, after granting certiorari, concluded that industry members did not have standing to challenge a Walsh-Healey Act determination. The clear purpose of the Fulbright Amendment was to remove the barrier to standing found by this Court so that the locality issue could be considered on the merits (98 Cong. Rec. 6641 (1952)). Surely, Congress, as well as members of this and other industries contracting with the Government, expected with reason that the "ultimate judicial resolution" of the locality controversy would be had in this Court and not in an intermediate court. Thus the important question of

federal law presented by this petition calls for decision by this Court now.

3. Respondents urge denial of certiorari because petitioners' appeal now pending in the Court of Appeals presents other issues not included in the petition. Petitioners do not consider such issues appropriate for review on a petition for certiorari before judgment. But they do consider that, because of the great importance of the locality issue and because resort to the Court of Appeals on that issue would plainly be futile, review of such issue now by this Court is appropriate and necessary. Petitioners believe that their other grounds of challenge to the determination are valid and substantial. Nevertheless, in view of the overwhelming importance to this industry and other industries of obtaining a decision by this Court on the locality issue, petitioners now undertake, upon a grant of certiorari, to withdraw all their other grounds of appeal in the Court of Appeals. This undertaking leaves without semblance of substance the Secretary's objections to "piecemeal review".

4. Respondents refer also to their cross appeals relating to issues of standing. But the Secretary has conceded the standing of three petitioners.* Thus, even if the Secretary were to prevail on his appeal, these three would still have standing to continue the challenge to the determination. Postponement of a decision on the merits of this petition for action on the Secretary's appeal would indeed "serve only to prolong this litigation unduly". This Court's disposition of the petition is not dependent upon the number of petitioners. A decision by this Court on the locality issue will, in any event, be controlling on the Secretary and all members of the Industry.

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* Burlington Mills Corp., Chatham Manufacturing Co., and The Leaksville Woolen Mills, Inc.

5. The Union makes the unusual contention that the District Court erred in not ruling on standing in such a way as to render the Fulbright Amendment unconstitutional. The District Court construed the Fulbright Amendment to grant standing only to petitioners showing actual aggrievement by the determination (Petition, Appendix A, p. 16). The Union's opposition to certiorari on the ground that the District Court should have read the Amendment in a manner which the Union says would make it unconstitutional should be disregarded as frivolous.

6. Finally, the Secretary opposes certiorari because more of the record has been lodged with this Court than need be considered in passing on the issue presented by the petition. The point is plainly without merit. The certified transcript of the record below was filed in accordance with this Court's Rule 21. The Secretary does not contend that the petition fails to set forth, by summary and appendix, enough of the proceedings below to serve the Court's needs in passing on the petition. Should the writ be granted, petitioners will, of course, in accordance with Rule 26, designate for printing those parts of the record deemed necessary to a consideration of the case on the merits.

Respectfully submitted,

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